

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





# 77-7018

To be argued by  
FLOYD ABRAMS

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,  
ROBERT H. WHITE-STEVENS, Ph.D.,

*Plaintiffs-Appellees*

P/S

—against—

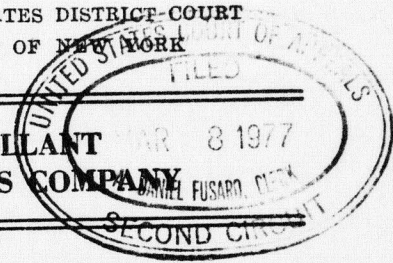
NATIONAL AUDUBON SOCIETY, INC.,  
ROBERT S. ARBIB, JR., ELVIS J. STAHR, JR.,

*Defendants,*

THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT,  
*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR APPELLANT**  
**THE NEW YORK TIMES COMPANY**



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J. GORDON EDWARDS, Ph.D., THOMAS H. JUKES, Ph.D.,  
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*Plaintiffs-Appellees,*

—against—

NATIONAL AUDUBON SOCIETY, INC.,  
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THE NEW YORK TIMES COMPANY and ROLAND C. CLEMENT,  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR APPELLANT  
THE NEW YORK TIMES COMPANY**

This is an appeal by defendant-appellant The New York Times Company (the "*Times*") from judgments entered against it in a libel case. Appeal is taken, as well, from the failure of the United States District Court for the Southern District of New York, Hon. Charles M. Metzner, U.S.D.J., to grant judgment *n.o.v.* after the jury verdicts and from a variety of prejudicial errors made by the District Court to which exception was duly taken.

This case relates to—as the jury found and as Judge Metzner acknowledged—the *accurate* reporting by the *Times* of accusations made by officials of the National Audubon Society, Inc. ("Audubon") against five scientists,



three of whom commenced this action. The accusations arise out of the heated, often overheated, national debate over the use of DDT and its possible effect on bird life in which the plaintiffs and Audubon were—and are—opponents. In the context of that debate, Audubon accused the plaintiffs of being, in effect, paid liars, an accusation reported by the *Times*, together with denials by those accused.

All agree that the three scientists who commenced this action are public figures and that the case is accordingly governed by principles set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. There is no claim that the *Times* published the Audubon charges with knowledge of their alleged falsity; Judge Metzner, in any event, held that “[i]t cannot be said that the *Times* knew that the statements in the story were false.” (211a)<sup>1</sup> Plaintiffs’ allegations were to the effect that the *Times*’ publication of Audubon’s charges were “reckless” and Judge Metzner in refusing to grant the *Times*’ motion for judgment *n.o.v.* held that the accurate story had been published “with reckless disregard of whether it was false or not.” (211a)

The central issue posed by the case is whether, given the now undisputed fact that the *Times* accurately reported the accusations made by Audubon against the plaintiffs, it may be held liable. We believe that the imposition of such liability under the circumstances of this case is utterly inconsistent with libel law since it has been “re-written in light of the constitutional imperatives”<sup>2</sup> of

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<sup>1</sup> All numbers followed by “a” used in this Brief refer to Volume 1 of the Joint Appendix. All numbers Tr. 1 through Tr. 664 refer to pages of the Trial Transcript as numbered by the Court Reporter. The Trial Transcript is contained in Volume II of the Joint Appendix. All numbers followed by “e” refer to Volume III of the Joint Appendix, which contains the trial Exhibits (all those admitted into evidence as well as certain Exhibits marked for identification but not admitted).

<sup>2</sup> *Buckley v. Littell*, 539 F.2d 882, 888 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3489 (U.S. January 17, 1977).

the First Amendment and that on this ground alone the judgments should be reversed.

### Issues Presented

(1) Whether, given the conclusion of a jury that the *Times* accurately reported charges made by the National Audubon Society, Inc, against public figure plaintiffs, a jury verdict against the *Times* was constitutionally permissible as being supported by clear and convincing proof of actual malice.

(2) Whether the trial court improperly deprived the *Times* of an opportunity to show that the charges reported by the *Times* were not defamatory in the context of the heated controversy over the use of DDT in which they were made by holding that such charges were libelous *per se* and by excluding from evidence, over the objection of the *Times*, statements made by the plaintiffs with respect to the DDT debate.

### Nature of the Proceedings

This diversity action for defamation was commenced by three scientists, Dr. J. Gordon Edwards, Dr. Thomas H. Jukes and Dr. Robert H. White-Stevens, against the National Audubon Society, Inc., three Audubon employees, and The New York Times Company.<sup>3</sup> The action was based upon three documents: the "Foreword" to the April 1972 issue of *American Birds*, a quarterly publication of Audubon (Plaintiffs' Exhibit 2, 668e); a subsequent report on that Foreword and reactions to it in the August 14, 1972 editions of *The New York Times* (Plaintiffs' Ex-

<sup>3</sup> Separate suits initiated by the plaintiffs in 1973 against the corporate defendants [72 Civ. 1727 (CMM)] and the individual Audubon defendants [73 Civ. 3153 (CMM)] were consolidated for all purposes in 73 Civ. 1727 (CMM) by order of the court on September 30, 1974.



hibit 1, 665e); and a letter written by one Audubon defendant, Roland C. Clement, to the *Times* dated August 14, 1972 (Plaintiffs' Exhibit 3, 670e).

In December, 1975, the *Times* and the Audubon defendants made separate motions for summary judgment based upon affidavits in support of the motions, depositions and other discovery materials. The District Court denied these motions (90a-96a), granted reargument thereof, and upon reargument, adhered to the original order denying summary judgment and denied motions by the *Times* and the Audubon defendants for certification of the order denying summary judgment to permit an interlocutory appeal to this Court under 28 U.S.C. § 1292(b) (1970). The opinion by Judge Metzner so ruling is reported at 411 F.Supp. 744 (S.D.N.Y. 1976) and is reproduced in the Appendix at 105a-108a.

On June 9, 1976, following five days of trial before Judge Metzner and a jury, the jury returned a verdict against the *Times* and Audubon defendant Clement. The jury awarded compensatory damages against the *Times* and Clement with respect to the *Times* article of August 14, 1972 in the amounts of \$21,000 to Dr. Edwards and \$20,000 each to Dr. Jukes and Dr. White-Stevens. An additional \$1.00 in compensatory damages was awarded to each plaintiff against Clement with respect to his letter of August 14, 1972 to the *Times*.<sup>4</sup> No punitive damages were awarded. The *Times* and Clement filed motions for judgment notwithstanding the verdict, both of which were denied in separate opinions issued in December 1976 by Judge Metzner (203a-212a; 213a-215a). The *Times* and Clement appealed.

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<sup>4</sup> The letter was not published by the *Times* (Tr. 513).

## Statement of Facts

### *The Parties*

The three plaintiffs-appellees are each professors who have been active participants in the national debate over the use of DDT. Dr. Edwards is a professor of entomology at San Jose State University in California (Tr. 241); Dr. Jukes is a professor of medical physics at the University of California at Berkeley (Tr. 279); and Dr. White-Stevens is a professor of biology and chairman of the Bureau of Conservation and Environmental Science at Rutgers University (Tr. 154). Each has written extensively on the subject of the use of DDT, and critically of Audubon's position with respect thereto.<sup>5</sup>

Defendant-appellant The *Times* publishes *inter alia*, The New York Times.

Defendant-appellant Roland C. Clement is Vice President of Audubon, an organization devoted to the preservation of wildlife and natural areas and to related educational efforts (Tr. 490). Clement has been active in the DDT controversy and has written articles critical of the plaintiffs' position with respect thereto.<sup>6</sup>

Three other defendants in the proceedings below, Audubon, Robert S. Arbib, the editor of *American Birds* and Dr. Elvis J. Stahr Jr., President of Audubon, are not

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<sup>5</sup> Representative writings of each of the plaintiffs during the course of the DDT controversy, including articles, congressional testimony and letters, are reproduced in Volume III of the Appendix beginning on the following pages: Dr. Edwards (745e, 1034e, 1044e, 1094e, 1104e, 1154e, 1158e, 1164e, 1167e, 1169e); Dr. Jukes (971e, 1002e, 1005e, 1010e, 1095e, 1097e, 1100e, 1103e); Dr. White-Stevens (800e, 1050e, 1066e, 1102e, 1109e, 1118e, 1136e). These writings were offered into evidence at trial by the *Times* (as well as by the Audubon defendants) but not admitted. That exclusion of this evidence was error is argued in Part II *infra*.

<sup>6</sup> *E.g.*, Roland C. Clement, "The Pesticides Controversy," *Environmental Affairs*, Vol. 2, No. 3, Winter 1972 (Audubon Exhibit D, 771e).

parties to this appeal. The jury found in favor of Audubon and Arbib. Prior to charging the jury, Judge Metzner granted an unopposed motion to dismiss made on behalf of Dr. Stahr (Tr. 629).

### **Background**

For at least fifteen years, there has raged a great debate in this country over the use of DDT and its effects on wildlife. Among the most active opponents of DDT has been Audubon, an organization particularly concerned with the alleged hazards of DDT to birds. Defenders of DDT, including Drs. Edwards, Jukes and White-Stevens, have vigorously opposed efforts to restrict its use. They have argued that the hazards attributed to DDT by environmentalists have been grossly exaggerated and poorly documented, and that DDT is needed to protect millions of people around the world from disease and famine. The public controversy over the use and alleged misuse of DDT has been contentious and acerbic. There have been mutual allegations of misuse of scientific data and bitter—often venomous—charges and counter-charges, including personal accusations on both sides.<sup>7</sup> It was in the context of

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<sup>7</sup>For example, Edwards, following the announcement by the Environmental Protection Agency in June 1972 of a ban on DDT for farm uses, issued a press release entitled "The Infamous Ruckelshaus DDT decision" accusing witnesses who had opposed DDT in testimony before Congress, several of whom he identified by name, of "experimental bungling, ineptitude, shameless obfuscation, and the deliberate publication of errors. . . ." (1035e), and of "possible perjury" (1036e). (*Times Exhibit EE, 1034e*) Earlier Dr. Edwards had written the following to the Editor of the *Audubon Magazine*:

"I still find it incredible that the Audubon Society leaders persist in their heavily-financed de facto murder plot against the human race, and I shall continue to speak out against their genocidal campaign to ban all exports of DDT" (Letter dated February 17, 1970, *Times Exhibit WWW, 1169e*).

Edwards had also written to the same Audubon editor that Audubon "deliberately publishes lies about DDT causing cancer, killing birds, causing thin-shelled eggs, and persisting in the en-



this debate that the allegedly defamatory statements at issue in this action came to be made by Audubon and reported by the *Times*.

### ***The Alleged Libels***

With a single exception, to be discussed below (under "The Summary Judgment Motion"), the facts of this action as they relate to the *Times* have been essentially undisputed from the outset.<sup>8</sup>

Audubon, in the April, 1972 issue of its quarterly publication *American Birds*, published the results of its

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environment for years" (Letter dated December 5, 1969, *Times* Exhibit UUU, 1167e).

Clement, in an article responding to what he termed the "intemperate attacks" (771e) and the "inundation of distorted claims" (773e) by defenders of DDT, wrote that the testimony of Edwards in favor of DDT on March 18, 1971 before the House Committee on Agriculture was "so replete with distorted references to scientific literature, and so sprinkled with unsupported opinion that it is difficult to comment on except on a line by line basis" (775e). Roland C. Clement, "The Pesticides Controversy," *Environmental Affairs*, Vol. 2, No. 3, Winter 1972 (Audubon Exhibit D, 771e).

The District Court held inadmissible into evidence (incorrectly, we believe) all statements such as these showing the highly charged and emotional DDT debate in which the plaintiffs were leading participants. See Part II, *infra*.

<sup>8</sup> This Brief will not address the considerable testimony at trial involving issues disputed solely as between plaintiffs and Audubon, such as whether or not Audubon had deliberately set out to attack the reputations and scientific credibility of pro-DDT scientists. Testifying for the plaintiffs in this regard, Victor Yannacone, Jr., a lawyer who worked with Audubon on environmental matters, stated that during certain meetings attended by Clement in the late 1960's, there were discussions among leaders of the Environmental Defense Fund of how to "silence" certain prominent defenders of DDT and that "the primary discussions involved Dr. Jukes" (Tr. 335). That any such discussions occurred was denied by the Audubon witness, Charles F. Wurster, Associate Professor of Environmental Science at the Marine Sciences Research Center of the State University of New York at Stonybrook (Tr. 544-45). The *Times* took no position as to such matters at trial. None of them bear on this appeal by the *Times*.

annual Christmas bird count—a yearly, but apparently none-too-scientific count by Audubon members of how many birds they viewed in the field. In past years, proponents of DDT, including the plaintiffs, had cited the fact that the Audubon bird count was increasing, notwithstanding the continued use of DDT, as evidence for their argument that DDT was not harmful to birds.<sup>9</sup> Audubon considered—and considers—such interpretations of its bird count as “false and misleading”. In the Foreword to its April 1972 issue, Audubon responded to its critics as follows:<sup>10</sup>

“We are well aware that segments of the pesticide industry and certain paid ‘scientist-spokesmen’ are citing Christmas Bird Count totals (and other data in *AMERICAN BIRDS*) as proving that the bird life of North America is thriving, and that many species are actually increasing despite the widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.

“This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving of reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fish-eaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this. In addition, with the con-

<sup>9</sup> *E.g.*, Phillip H. Marvin, “Birds on the Rise” (Plaintiffs’ Exhibit 16; 742e); Dr. Thomas H. Jukes, “The *TRUE* facts about Pesticides and the Environment”, *Farm Chemicals*, March, 1967 (marked for identification as *Times* Exhibit S but not admitted, 1005e); Dr. J. Gordon Edwards, “Environmental Kangaroo Court”, unpublished paper dated February 23, 1972 (marked for identification as *Times* Exhibit FF but not admitted, 1044e); Robert H. White-Stevens, “The Role of Pesticides in Food Production and Health”, speech given in 1968 (marked for identification as *Times* Exhibit PP but not admitted, 1066e, 1090e).

<sup>10</sup> The Foreword is reproduced in full at 668e-669e.

stant diminution of natural habitat, especially salt- and freshwater marshes, it is self-evident that species frequenting these habitats are less common than formerly.

"The apparent increases in numbers of species and individuals on the Christmas Bird Counts have, in most cases, nothing to do with real population dynamics. They are the result of ever-increasing numbers of birders in the field, better access to the Count areas, better knowledge of where to find the birds within each area, and increasing sophistication in identification.

"With increased local coverage by the press of Christmas Bird Count activities, it is important than (*sic*) Count spokesmen reiterate the simple and truthful fact that what we are seeing is result of *not more birds, but more birders*. Any time you hear a 'scientist' say the opposite, you are in the presence of someone who is being paid to lie, or is parroting something he knows little about." (emphasis in original)

The Audubon Foreword containing these charges, which (despite its date) was not distributed until the first week of July 1972, came to the attention of John Devlin, Sr., a *Times* reporter who had often written on nature, sometime in late July or early August. Devlin read the Foreword and finding it newsworthy, telephoned Robert S. Arbib, Jr. the Audubon editor who had signed the Foreword and asked Arbib to identify the unnamed persons he referred to in the Foreword as paid liars (Tr. 65-68, 434-35). Arbib, after initially declining to provide any names, passed on Devlin's inquiry to Roland C. Clement, Vice President of the Audubon Society and a defendant-appellant herein, who gave Arbib a written critique of the pro-DDT views of five scientists he had prepared for publication<sup>11</sup> (Tr. 438, 501).

<sup>11</sup> Then in the form of a typed manuscript, this critique was later published under the title "The Pesticides Controversy," in *Environmental Affairs*, Vol. 2, No. 3, Winter 1972, in which form it was admitted into evidence as Audubon Exhibit D, 771e-794e.



Arbib then furnished Devlin with five names drawn from Clement's article (Tr. 441).<sup>12</sup>

Devlin attempted to reach the individuals named by Arbib, and was successful in reaching three of them. He spoke with Dr. White-Stevens on August 4 and Dr. Jukes on August 7, soliciting their reactions to the "American Birds" Foreword (Tr. 101, 102). Both scientists, according to their testimony, denied the Audubon charges (Tr. 164, 291-92). Both followed up their conversations with Devlin by sending him letters enclosing scientific literature on the DDT question.<sup>13</sup> Devlin also spoke with Donald A. Spencer, another of the five scientists named by Arbib. Spencer, a retired ecologist who is now a private consultant, is not a party to this action. Spencer called the Audubon charges "almost libelous" (Tr. 75).

On August 14, 1972, the *Times* published, under the headline "Pesticide Spokesmen Accused of 'Lying' on Higher Bird Count," an article concerning the Audubon Foreword. The article quoted and discussed the Foreword, named the five scientists who had been cited by Arbib in his interview with Devlin and summarized the reactions and denials of the scientists to the Audubon charges. In its entirety, the article provided as follows:

"Segments of the pesticide industry and certain 'scientist-spokesmen,' are accused in the current issue of American Birds of 'lying' by saying that bird life in North America is thriving despite the use of DDT.

"The publication is sponsored by the National Audubon Society in collaboration with the United States

<sup>12</sup> Arbib, in his testimony, disclaimed knowledge when he wrote the "Foreword" of any particular scientists to whom the Foreword related (Tr. 444).

<sup>13</sup> The White-Stevens letter and enclosures (Audubon Exhibit Z) are reproduced at 795e-970e. The Jukes letter and enclosures (Plaintiffs' Exhibit 14) are reproduced at 689e-741e.

Fish and Wildlife Service. The delayed current issue is devoted principally to results of the 72d Christmas Bird Count.

"The accusation against the pesticide industry and some of its spokesmen is contained in the foreword by Robert S. Arbib, Jr., editor.

"He wrote that the reason the Christmas Bird Count showed more birds, as cited by pesticide industry spokesmen, was not that there were more birds these days but simply 'more birders' who go out on the annual counts and thus increase the size of the totals reported.

#### Accused Men Named

"The persons under attack were not identified in the publication.

"However, Mr. Arbib said in an interview that they included Robert H. White-Stevens, formerly with American Cyanamid Company, and now in the Bureau of Conservation and Environmental Science, Rutgers University; Thomas H. Jukes, a biochemist at the University of California; Norman E. Borlaug, Nobel Prize winner; Dr. J. Gordon Edwards, a lecturer and professor of entomology at San Jose State College; and Dr. Donald A. Spencer, a retired ecologist and lecturer of the National Agricultural Chemical Association who's now a private consultant and a member of the National Audubon Society.

"Not all of the men could be reached for comment but those who could ridiculed the accusations as 'emotional,' 'hysterical,' and unfounded, and Dr. Spencer said they were 'almost libelous.'

"'We are well aware,' Mr. Arbib wrote, 'that segments of the pesticide industry and certain paid "scientist-spokesmen"' are citing Christmas Bird Count totals and other data in *American Birds* as proving that the bird life of North America is thriving, and that many species are actually increasing despite the

widespread and condemned use of DDT and other non-degradable hydro-carbon pesticides.

#### 'Serious Declines' Found

" 'This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons. The truth is that many species high on the food chain, such as most bird-eating raptors and fisheaters, are suffering serious declines in numbers as a direct result of pesticide contaminations; there is now abundant evidence to prove this.'

"He said that with the increased coverage of Christmas Bird Counts by the press, it was important for Christmas Count spokesmen to 'reiterate' what we are seeing is not more birds but more birders.

" 'Anytime you hear a "scientist" say the opposite,' he continued, 'you are in the presence of someone who is being paid to lie, or is parroting something he knows little about.'

On the morning of the *Times*' publication, Clement drafted a letter to the *Times*, read it over the telephone to Arbib who was out of town and sent it out over Arbib's signature (Tr. 462-64, 504). The letter referred to "Jack Devlin's punchy piece" and concluded with the following paragraph:

"Nor do we like to call people liars, but those who have most consistently misused our data—Robert H. White-Stevens of Rutgers University, Thomas H. Jukes of the University of California, J. Gordon Edwards of San Jose State College, Donald A. Spencer of the National Agricultural Chemicals Associations, and more recently Nobel laureate Norman E. Borlaug—certainly have had time to learn from our patient explanations of their misinterpretations of our data over the several years of the DDT controversy." (Plaintiffs' Exhibit 3, reproduced in full at 670e)



Plaintiffs' complaint was filed on April 18, 1973. As it relates to the *Times*, the complaint alleged that in reporting the charges made by Audubon, the *Times* had published defamatory falsehood about the plaintiffs with malice (Complaint, ¶¶ 20, 22, 15a). Counsel for plaintiffs conceded at trial that no charge of actual malice in the sense of knowing falsity had been made against the *Times* but rather the allegation against the *Times* under the rule of *New York Times Co. v. Sullivan, supra*, "depends squarely upon the second branch, that is, a reckless disregard as to whether the matter was true or not." (Tr. 407)<sup>14</sup>

### ***The Summary Judgment Motion***

On December 5, 1975, discovery having been concluded, the *Times* moved for summary judgment. The *Times* urged that the plaintiffs, having for years worked actively to influence the outcome of the DDT debate through lectures, congressional testimony and writings, were public figures in the context of this action, and as such, had failed to sustain the special burden incumbent upon them under *New York Times Co. v. Sullivan, supra*, and its progeny to raise such disputed genuine issue of fact as would permit a jury to find, based upon clear and convincing evidence, that the *Times* article was published with actual malice. Judge Metzner ruled that the plaintiffs were public figures in the context of this action (93a) but denied summary judgment on the ground that "[t]he burden is on the movants to show the absence of any genuine issue as to whether they acted with actual malice when they made the statements" (93a) and that pretrial depositions of the parties and of prospective witnesses had raised disputed questions of fact (95a-96a).

When motions were made for reargument and certification to this Court of Judge Metzner's decision—motions

<sup>14</sup> This is in striking contrast to plaintiffs' assertion of knowing falsity as well as reckless disregard against the Audubon defendants (Tr. 405).

based on, *inter alia*, the patent incorrectness of Judge Metzner's ruling as to burden of proof on such a motion<sup>15</sup>—Judge Metzner granted reargument but adhered to his prior ruling denying summary judgment (411 F.Supp. 744; 105a-108a). His opinion (which also denied certification) was based in its entirety on the existence of a single factual issue which was held to preclude the granting of summary judgment: conflicting deposition testimony of Arbib and Devlin as to what was said in the telephone conversation during which Arbib furnished Devlin with the scientists' names later published by the *Times*.

The deposition testimony was summarized in the following fashion by Judge Metzner:

"Defendant Arbib is the author of the quoted portion from 'American Birds.' On deposition, he unequivocally states that when he furnished the names to Devlin, the *Times*' reporter, he made it abundantly clear that they were not to be included as members of a group who were being paid to lie, but were to be included in a group referred to in the article who misconstrued the data.

"Devlin on deposition flatly denies that Arbib placed the furnished names in any specific category. Devlin says he merely asked for the names of persons referred to by the article and was given those which

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<sup>15</sup> *Miller v. News Syndicate Co.*, 445 F.2d 356, 358 (2d Cir. 1971); *Bon Air Hotel v. Time, Inc.*, 426 F.2d 858, 864 (5th Cir. 1970); *United Medical Laboratories v. Columbia Broadcasting System, Inc.*, 404 F.2d 706, 712 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Buchanan v. Associated Press*, 398 F.Supp. 1196, 1202-04 (D.D.C. 1975); *Guitar v. Westinghouse Electric Corp.*, 396 F.Supp. 1042, 1052 (S.D.N.Y. 1975); *Mecropol v. Nizer*, 381 F.Supp. 29, 32 (S.D.N.Y. 1974); *F & J Enterprises, Inc. v. Columbia Broadcasting Systems, Inc.*, 373 F.Supp. 292, 299 (N.D. Ohio 1974); *LaBruzzo v. Associated Press*, 353 F.Supp. 979, 987-88 (W.D.Mo. 1973); *Cerrito v. Time, Inc.*, 302 F.Supp. 1071, 1076 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971).

appear in the news story." (411 F.Supp. at 746, 107a)<sup>16</sup>

Judge Metzner concluded that summary judgment could not be granted in the face of such conflicting testimony, because:

"In essence, we are confronted with what may be called a 'one on one' situation. If the finder of the fact believes Arbib and disbelieves Devlin, then a jury would be justified in finding plaintiffs have sustained their burden of showing actual malice." (*Id.* at 746, 107a)

He then observed that:

"The rule in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) is that:

"[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *Id.* at 731.

"This statement is a summary of the decisions in *New York Times Co. v. Sullivan*, *supra*, and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153, 87 S.Ct. 1975, 1990, 18 L.Ed.2d 1094, 1110 (1967). If the jury believes Arbib's statement and disbelieves Devlin, then the Times was aware of the falsity of the publication.

<sup>16</sup> Notwithstanding this conflict in testimony, the *Times* had argued that summary judgment in its favor was required, since even if Arbib were to be believed and Devlin disbelieved, Arbib's testimony at most established that Devlin committed an error of interpretation or judgment in writing his story in the genuine but possibly misguided belief that he had accurately recorded what he had read in the Foreword and heard from Arbib. The position of the *Times* was, and remains, that its motion for summary judgment should have been granted. See, e.g., *Time, Inc. v. Pape*, 401 U.S. 279, 290-91 (1971).



The above quotation from the *St. Amant* case is followed by:

“‘[S]uch a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant’s testimony that he published the statement in good faith and unaware of its probable falsity. . . . Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs it is essential that the First Amendment protect some erroneous publications as well as true ones.’ *St. Amant v. Thompson*, 390 U.S. at 731-32, 88 S.Ct. at 1326, 20 L.Ed 2d at 267.” (*Id.* at 746-47, 107a-108a)

Judge Metzner further concluded that the “one on one” issue would be dispositive at trial with respect to plaintiff’s allegations of actual malice:

“The issue in the instant case is not ignorance or mere failure to inquire, or the protection of some erroneous publication. The issue is who is telling the truth and the resolution of that issue must await the trial.

“As far as the Audubon defendants are concerned, the resolution of the disputed conversation between Arbib and Devlin will also dispose of that claim.” (411 F.Supp. at 748, 108a)

### ***The Trial***

Trial of the action commenced on June 3, 1976. At an *in limine* hearing prior to impaneling a jury, Judge Metzner ruled that the three publications complained of by plaintiffs—the Audubon “Foreword”, the *Times* article and the Audubon letter of August 14, 1972 to the *Times*—were libelous *per se* under New York law (Tr. 4). An extended discussion then ensued between Judge Metzner

and counsel with respect to the admissibility of a variety of statements published by the plaintiffs themselves in the course of the highly charged and emotional DDT controversy. Counsel for the *Times* stated that he was prepared to submit evidence that the plaintiffs had frequently made public statements sharply critical of DDT opponents including Audubon, using the very word "liar" complained of in this action and other language at least as harsh if not harsher than that published by Audubon and the *Times* (Tr. 22). Counsel for the *Times* argued that such statements were probative as to various issues in the case, principally with respect to the context and meaning of the words complained of by plaintiffs and with respect to damages. A similar offer of proof was made by counsel for Audubon. Plaintiffs' counsel opposed any use of such evidence. At this preliminary juncture, Judge Metzner stated that he would permit use of such evidence on "a bit by bit basis" leaving any further disputes for settlement at the bench (Tr. 25).<sup>17</sup> However, when the first use of such evidence was attempted at trial (during cross-examination of Dr. White-Stevens by counsel for Audubon), Judge Metzner ordered that no further cross-examination on the basis of any published statements of plaintiff attacking DDT opponents be made (Tr. 206), on the ground that such statements had no relevance to the case (Tr. 211).

Plaintiffs' case at trial consisted primarily of testimony by Devlin, who was called as an adverse witness, Dr. White-Stevens, Dr. Jukes and Dr. Edwards.<sup>18</sup> As each plaintiff

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<sup>17</sup> The incorrectness of Judge Metzner's rulings in this respect is discussed at length in Part II, below.

<sup>18</sup> As previously mentioned, Victor Yannacone, Jr. testified with respect to alleged malice harbored by Audubon and Clement toward the plaintiffs. Other witnesses for plaintiffs were Maurice Freedman, Coordinator of Technical Services of the New York Public Library, who testified as to the circulation of *The New York Times* and related matters (Tr. 351) and Philip H. Marvin, a consultant on crop protection, who testified as to the alleged falsity of the Audubon statements (Tr. 365).

was called to testify, counsel for the *Times* made an offer of proof with respect to certain of that plaintiff's writings on the DDT controversy.<sup>19</sup> Each offer was denied by Judge Metzner (Tr. 218-22, 263-68 and 303-06).

The presentation of plaintiffs' case concluded with *no* proof in the record (Arbib having not yet testified) to contradict testimony by Devlin that he wrote his article of August 14, 1972 without having any doubt that it was an accurate statement of what the Audubon "Foreword" said and what he had been told by Arbib (Tr. 65-69, 133-34). Moreover, Devlin's testimony as to accuracy of his article had been corroborated by that of Dr. White-Stevens and Dr. Jukes, who had testified that during their respective telephone conversations with Devlin, he had told them that their names had been given him by Arbib as persons referred to in the Audubon "Foreword" (Tr. 164, 286).

Accordingly, the *Times* moved for a directed verdict at the close of plaintiffs' case (Tr. 405-07, 411-14). Judge Metzner, despite his prior ruling as to the dispositive role of the "one-on-one" issue in this case and the existence of a record at this point wholly supportive of the position of the *Times* as to that issue, reserved decision on the motion of the *Times*, observing that "the jury is entitled to say 'We do not believe he [Devlin] had no serious doubts'" (Tr. 410).

Arbib and Clement then testified on behalf of themselves and Audubon.<sup>20</sup> The *Times* called no witnesses.

<sup>19</sup> Similar offers of proof were made by counsel for the Audubon defendants.

<sup>20</sup> The Audubon testimony, to the extent it related to the action against the *Times*, focused on the issue of whether, as reported by the *Times*, Arbib had in fact named the five scientists, including the plaintiffs, as the persons who had been accused in the Foreword. Arbib again denied he had called the plaintiffs paid liars (Tr. 440), notwithstanding Clement's August 14 letter which included the phrase "Nor do we like to call people liars, but . . ." Clement, when asked on cross-examination "[w]ho are the people who at the



At the close of all the evidence, the *Times* renewed its motion for a directed verdict, contending that the evidence compelled the conclusion that Devlin's article accurately reported the Audubon charges and the scientists' denials, and in any event, did not prove, much less clearly and convincingly, that Devlin entertained any serious doubts that he had accurately reported the story (Tr. 555).

Before proceeding to instruct the jury, after reserving judgment on the motion, Judge Metzner dismissed the action with respect to the Foreword to the April 1972 issue of *American Birds* because of its lack of any reference by name to the plaintiffs (Tr. 552). The jury was then charged with respect to two alleged libels, the *Times* article and the Audubon letter. Judge Metzner refused to give the instructions requested by the *Times* on the issue of actual malice (Tr. 559-60), which refusal was objected to by the *Times* (Tr. 642).<sup>21</sup> Counsel for the *Times* also objected to

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time [the Foreword] was published [were] making false and misleading statements and distorting the facts for the most self-serving of reasons," responded, "[t]he three plaintiffs in this case, plus two others I cited in my article" (Tr. 507).

There was also testimony with respect to internal Audubon memoranda written by Clement. One such memorandum (*Times* Exhibit UU, 1093e) by Clement stated:

"Devlin said Arbib called our critics liars, not Arbib. Arbib was probably incautious in giving Devlin the names involved, something he got from me. Devlin probably asked whom do you consider liars, and Arbib was trapped into listing people I have never called liars, though they may be. The same trap was sprung on me at last week's Detroit television show with Don Spencer."

These matters do not bear on the *Times*' appeal, in light of the jury finding and Judge Metzner's conclusion that the *Times* accurately published the information given it by Arbib.

<sup>21</sup> The *Times* had proposed that the jury be charged, *inter alia*, that:

"If you find that the *New York Times* article at issue in this case was a substantially accurate report of information supplied by the Audubon Society and Mr. Arbib, and you further find that the *Times* could reasonably have considered the Audubon Society and Mr. Arbib to be reliable sources,

various portions of the charge given by the judge, including an instruction—quite contrary to Judge Metzner's previous "one-on-one" ruling—that "[r]eckless disregard . . . does not refer to whether Devlin accurately reported the information he obtained from Arbib" (Tr. 633, 643).

Judge Metzner, in accordance with his preliminary ruling, and over objection, instructed the jury that the *Times* article and the Audubon letter were defamatory as a matter of law (Tr. 632, 648). Nevertheless, each of the 6 forms of special interrogatories which Judge Metzner submitted to the jury at the conclusion of the charge (one for each plaintiff covering each of the two alleged libels) commences with the questions:

- a. "was — [name of plaintiff] libelled?"
- b. "If yes, by which defendant(s)?" (220a-224a)

The *Times* objected to these questions on the basis of their confusing nature, given the Court's prior statement in the presence of the jury that the published material was libelous *per se* (Tr. 508).

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then you must return a verdict for the New York Times Company. A newspaper is entitled to rely upon outside sources of information without independent verification unless those sources have a low community assessment as to trustworthiness, or unless those sources are persistently inaccurate or for some other reason they are unworthy of belief. Even if you find that the *Times* article complained of by plaintiffs was an inaccurate report of the information supplied by the Audubon Society and Mr. Arbib, you must return a verdict for the *Times* unless you find that this inaccuracy was due to actual malice, that is, that the *Times* reporter, John Devlin, deliberately distorted the information he received, or drafted his story despite actually having serious doubts whether the text as he wrote it actually reported what he had read in the Audubon Society publication, *American Birds*, and what he had been told on the telephone by Mr. Arbib." (*Times* Requested Instruction No. 12, 144a.)

After the jury returned verdicts in favor of plaintiffs against the *Times* and Clement, motions for judgment *n.o.v.* were made; they were denied by Judge Metzner (203a, 213a).

## ARGUMENT

### I.

#### **The First Amendment Precludes the Imposition of Liability on The New York Times Company for Its Accurate Reporting of Accusations Made Against Plaintiffs by the National Audubon Society.**

We start with the jury finding that, in Judge Metzner's words, "the *Times* accurately reported the five names furnished by Arbib as those referred to as liars in the Foreward."<sup>22</sup> That finding is central to the case.<sup>23</sup> For one

<sup>22</sup> Opinion and order denying motion of the *Times* for judgment *n.o.v.* (207a).

<sup>23</sup> It is also plainly correct. If the jury had believed otherwise, it could not properly have held against Clement with respect to the *Times* article of August 14 since, plainly, to the extent the *Times* printed information that Clement did *not* cause to be furnished to it, or, alternatively, printed information which was contrary in fact to that provided it as a result of Clement's efforts, there could have been no basis for finding Clement liable. New York law has long held that when a second party distorts information furnished it by another into a libel, the first party bears no responsibility for the libel. *Seroff v. Simon & Schuster, Inc.*, 6 Misc.2d 383, 391, 162 N.Y.S.2d 770, 777, 778 (Sup.Ct. N.Y. Co. 1957), *aff'd*, 12 App.Div.2d 475, 210 N.Y.S.2d 479 (1st Dep't 1960), *app. denied*, 12 App.Div.2d 755, 210 N.Y.S.2d 1000 (1st Dep't 1961). It has likewise been held that a person who gives a defamatory statement to a newspaper which later prints it "is responsible for any damage caused by the publication," but only "to the extent that the article represents an accurate statement" of what he said. *Campo v. Paar*, 18 App.Div.2d 364, 367-68, 239 N.Y.S.2d 494, 498 (1st Dep't 1963). *See also, Storch v. Gordon*, 23 Misc.2d 477, 479, 197 N.Y.S.2d 309, 312, 313 (Sup.Ct. Kings Co. 1960); *Roberts v. Breckon*, 31 App.Div. 321, 433-34, 52 N.Y.S. 638, 640 (4th Dep't 1898).



thing, it resolves squarely in favor of the *Times* the single question which led Judge Metzner *not* to grant summary judgment to the *Times* prior to trial. If Judge Metzner's summary judgment ruling was correct, there is no basis upon which judgment should not now be entered for the *Times*.

More broadly, the conclusion of the jury that the *Times* accurately reported the charges against the plaintiffs by Audubon frames the first issue for review by this Court: given such a jury finding, was it nonetheless permissible for the jury to impose liability upon the *Times*, given the requirement that the evidence demonstrate "clearly and convincingly" and "with convincing clarity" that the *Times* published the August 12, 1972 article with actual malice?

We deal first with the legal cases in this area which afford particular protection to the press in cases such as this; then to the deficiencies in proof in plaintiffs' case which, in any event, preclude any constitutional judgment against the *Times* in this case.

### ***The Pape Cases***

We start with the Supreme Court's decision in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). That case held that the omission of the word "alleged" from a *Time* magazine article summarizing a federal commission's report on police brutality failed to create a jury issue of actual malice, although the omission was done knowingly and caused the article to convey an erroneous impression that the commission had adopted as fact the allegations of a complaint filed in federal court. In the Court's view, the belief of *Time* employees, even if misguided, that their article fairly stated what the commission had said, provided no basis for an inference by the jury of actual malice. The Court held that, at most, defendants had committed an error of editorial judgment in adopting "one of a number of possible rational interpretations of a document that bristled with ambiguities." (401 U.S. at 290.)

In so holding, the Supreme Court attached special significance to the fact that the "news" element of the *Time* article there at issue, like the Devlin article of August 14, 1972, was the making of certain statements by a *third* party, which *Time* itself had not endorsed or adopted. The Court recognized that "a vast amount of what is published in the daily and periodical press purports to be descriptive of what somebody *said* rather than of what anybody *did*." (401 U.S. at 285 (emphasis in the original)). Noting that "[t]he question of the 'truth' of such an indirect newspaper report presents rather complicated problems", the Court indicated the need for special solicitude under the First Amendment for newspaper reports recounting what others have said without taking any independent position on the truth of those statements. (401 U.S. at 286.)

In a series of cases following *Pape*, the courts have applied this rule as the basis for summary judgments for defendants, affirmance of such summary judgments, and affirmance of judgments *n.o.v.* On differing facts, such cases hold that when a publication accurately reports accusations made against public figures by third parties, the publisher does not bear responsibility if the underlying charges it reports are later determined to be false.

One recent decision in this series, *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975), dealt with a *Newsweek* cover story on a series of disputes involving black college athletes. In the story, the plaintiff, a well-known college track coach, was reported to have threatened to expel black members of his college's team if they joined a boycott (protesting the racial policies of the meet's sponsor) of a track meet in which the team was to compete. Prior to writing his story for *Newsweek* the reporter involved had interviewed the plaintiff and had asked him about the boycott incident. Similarly to this case, plaintiff had denied making any such threat; his denial had

been included by the reporter in an article previously written by him for *Sports Illustrated*.

Subsequent to writing his piece for *Sports Illustrated* the reporter wrote the allegedly libelous cover story for *Newsweek* in which the same incident was discussed. Notwithstanding his having received a directly contradictory account from plaintiff, the reporter, based on allegations made against the plaintiff, proceeded to write a *Newsweek* story attributing the alleged threat to Vandenburg. The jury in *Vandenburg* found for the plaintiff.

The district court granted judgment *n.o.v.* and was affirmed by the Court of Appeals. Despite its conclusion that the reporter's knowledge of the plaintiff's conflicting statement put him "on notice" of the need for "a more careful investigation", the court held that the reporter's reliance on two sources, one of whom the court found could even be considered biased, was not "unreasonable". (507 F.2d at 1027.) Citing *New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966), for the proposition that "[w]hile verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution . . .", the court held that the reporter, having reasonably depended on a reliable source, did not have the high degree of awareness of probable falsity required for a showing of serious doubts and actual malice. (507 F.2d at 1028.) Precisely the same, we believe, may be said in this case.

The principle that the accurate reporting of charges against public figures made by reliable sources must receive special protection under *Pape* led the Court of Appeals for the First Circuit in *Medina v. Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971) to affirm a lower court's summary judgment for defendants. The challenged story discussed the My Lai tragedy and carried charges made by



an independent party claiming that plaintiff had killed a child. On appeal from summary judgment, plaintiff had argued that *Time* was liable for asserting the truth of charges against the plaintiff contained in a statement made to *Time's* reporter and reprinted in *Time's* story discussing the plaintiff. Finding that *Time* had merely recounted the charges without asserting their accuracy, the Court held that under *Pape* no showing of actual malice could be sustained.

Similarly, in *Thuma v. Hearst Corp.*, 340 F.Supp. 867 (D. Md. 1972) the district court refused to allow the question of reckless disregard and actual malice to go to the jury, ordering summary judgment for defendants. One of the determinative factors compelling the summary judgment was that the allegedly libelous story, involving a charge by the father of a child who had been shot to death by the plaintiff policeman that the shooting was a "cold-blooded murder," did not assert the truth of that charge but merely reported it. The reporter himself, a former policeman, had testified he had had sincere doubts that the shooting was a "cold-blooded murder" as he understood that term. He had further testified that he had no reason to believe it was such a murder and would not have reported the story as he did, "absent a quote." (340 F.Supp. at 871.) The court examined his belief, the understanding his readers would reasonably have had, and concluded that the father's reaction was itself an issue of concern to the public. The court concluded that entirely apart from the issue of whether the shooting was justified, printing the father's reaction, as a matter of public interest, had to be protected and could not be penalized under the standard of *New York Times Co. v. Sullivan*, *supra*, and its progeny. (340 F. Supp. at 872.) As summarized by the Court:

"The shooting in the instant case was a matter of public interest. Thuma was a 'public official.' The

father's comment on that shooting was, plaintiff concedes, accurately quoted. Moreover, the father's reaction was itself an issue of concern to the public. The incident was a particularly tragic one, occurring as it did within sight of the Talbott home shortly after the Talbott boy had behaved violently in that home and had caused several members of that family to become frightened both for themselves and for the boy. The latter was subsequently shot after running from the backyard of that house. His father, at the time those events occurred, was in a hospital recovering from a heart attack. Following the shooting, the Talbott boy was rushed to that very same hospital where he died in the emergency room. The son's hospitalization and death were not made known to his father until later. Thus, entirely apart from the issue of whether the shooting was justified, there were elements of personal tragedy which were of themselves of interest to the reading public, and which might not have been present had Talbott died under different circumstances. Under those circumstances, the father's reaction was itself a matter of public interest." *Id.*

The accurate reprinting of statements of an important public figure was also rejected as a basis for liability on the authority of *Pape* in *Novel v. Garrison*, 338 F.Supp. 977 (N.D.Ill. 1971). Involved was the reprinting in an article in *Playboy* of charges by Jim Garrison, then District Attorney for the Parish of Orleans, Louisiana, made against plaintiff Novel. Garrison's charges pertained to Novel's supposed involvement in an alleged conspiracy directed at the assassination of President Kennedy.

The court observed that as to the publisher of *Playboy*, "it is clear that the *Playboy* article described not what in its opinion Novel did, but rather what someone else (Garrison) said he did." (338 F.Supp. at 982.) Citing *Pape*, the court went on to say that it could "fathom no

way in which the defendant can be held accountable for 'actual malice' in accurately printing the actual statements" of Garrison. (338 F.Supp. at 982-83.) Thus as to the publisher, the court felt compelled under *Pape* to grant summary judgment dismissing him from the case.

The most recent case directly on point is that of *Oliver v. Village Voice, Inc.*, 417 F.Supp. 235 (S.D.N.Y. 1976). That case involved a statement in a *Village Voice* article attributed to a "Watergate investigator" to the effect that plaintiff was involved with the CIA and Howard Hunt. Plaintiff alleged that the statements were false and that the *Village Voice* reporter had published them knowing that the investigator's source was Howard Hunt—and thus published it recklessly, given Hunt's "dubious reputation for reliability." (*Id.* at 238.) The Court granted summary judgment to the *Village Voice* stating, in terms of direct applicability to this case:

"To establish recklessness, it is not sufficient to show that the reporting in question was speculative or even sloppy. There must be 'an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.' *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094 (1967). As defined by the Court in *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968):

'reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'

"Measured by this standard, plaintiff's first argument falls short. The fact that the subject matter was speculative and the statements in question controverted is not sufficient to permit the conclusion that



'the defendant in fact entertained serious doubts as to the truth of his publication.' Although plaintiff emphasizes Hunt's alleged unreliability as a source, the mere fact of his making a statement, given his prominent position in the Watergate controversy, would be a legitimate news story. Accepting plaintiff's argument would impermissibly stifle investigative reporting into controversial areas such as Watergate where fact and rumor tend to converge in the elusive search for the truth." (417 F.Supp. at 238.)

Cases such as *Pape*, *Vandenburg*, *Thuma*, *Novel* and *Oliver* are, we believe, of governing weight as applied to the instant case. The *Times* did not vouch for the Clement/Audubon charges; it correctly reported them and the denials to them; on that basis, and without more, we believe that the jury verdict against the *Times* may not stand.

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It should be noted that the Supreme Court's opinion in *Pape*, and the lower court opinions following it were rendered after *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), the major case cited by Judge Metzner at trial as authority for denial of the motions of the *Times* for a directed verdict (Tr. 410, 555). Perhaps more important is the fact that none of them conflicts with *Goldwater*, which involved an active attempt to conceal the publisher defendant's own assertions behind a shield of reliance on sources whose statements he distorted and misrepresented.

Considering the present case in light of *Goldwater*, two important distinctions must be made. The first of these stems from the fact that unlike the present case, *Goldwater* involved not the mere reporting of charges made by a third party against the plaintiff but rather the publisher's adoption and assertion of the truth of those charges. When Ginzburg reprinted distorted versions of third party statements questioning Senator Goldwater's mental stability,

he did so as part of a design, the Court of Appeals held, "from which a jury might reasonably find a predetermined and preconceived plan to malign the Senator's character." (414 F.2d at 337.) Surely no evidence in this case demonstrated such malicious intent which was an important factor in the rejection by the Court of Appeals of Ginzburg's claim that he had relied in good faith on the statements of others.

The second important distinction is apparent from the *Goldwater* Court's discussion of the principle it drew from *St. Amant v. Thompson*, 390 U.S. 727 (1968)—that repetition of another's words may not in every case release the repeater from liability. That principle must, of course, be read in the context of the full language and facts of *Goldwater*. After citing *St. Amant's* reliance language, the Court in *Goldwater* stated "[o]ne cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context." (414 F.2d at 337.) Thus while such reliance would not be a defense to liability in a case such as *Goldwater* in which a publisher distorted and misrepresented the third party's statements, it remains a complete defense in a case where such factors are not present.<sup>24</sup>

<sup>24</sup> That such an interpretation is correct is evident from the chronicling by this Court of the multiple abuses and falsifications in which Ginzburg engaged. The *Goldwater* court cites repeated instances in which Ginzburg: (1) fabricated statements (414 F.2d at 332), (2) added phrases, sentences and paragraphs to what were misrepresented in the article as original letters received by the publisher (at 334), (3) omitted material including important qualifying paragraphs from reprinted letters without giving any indication of the omissions (at 334, 337), and (4) misrepresented the source of letters reprinted (at 336). Thus, this was clearly not a case of accurately reporting charges made by others against the plaintiff. Further, Ginzburg not only failed to report letters received from the American Psychiatric Association and individual respondents assailing the validity of a poll he conducted as to psychiatrists' views on the plaintiff's mental health, but indeed completely ignored those attacks, reporting his poll as valid and truthful. (414 F.2d at 333, 334.)

### *The Deficiencies in Proof*

Moreover, even in the absence of the special protection afforded the press by cases ranging from *Pape* through *Oliver*, the evidence in this case falls far short of the clear and convincing proof needed to sustain a jury verdict of actual malice in any case governed by *New York Times Co. v. Sullivan*, *supra*.

Judge Metzner's denial of the motion of the *Times* for judgment *n.o.v.* is based in its entirety on the fact that *after* the Audubon charges were made to Devlin: (a) two of the plaintiffs and one non-plaintiff that Devlin contacted denied that the charges against them were true; (b) Jukes and White-Stevens furnished information to Devlin (Plaintiffs' Exhibit 14, 689e; Audubon Exhibit Z, 795e) setting forth their scientific positions; and (c) Devlin failed to consult with counsel to the *Times* after being told by Spencer and perhaps White-Stevens that the article was or might be libelous (204a-212a).<sup>25</sup>

Taking these allegations in reverse order, the failure to consult counsel can hardly be taken as proof of "serious doubts", not to say of a "high degree of awareness of probable falsity" of the article. If anything, a stronger argument might be made that consulting counsel rather than the failure to consult counsel might, at least under some circumstances, be suggestive of such doubts. This is, in fact, precisely what the case law confirms.

In *Hotchner v. Castillo-Puche*, 404 F.Supp. 1041 (S.D. N.Y. 1975), for example, a Doubleday & Co. editor sought legal advice concerning passages in a manuscript she viewed as potentially libelous. After the lawyer she consulted agreed with her concerns, commenting "this could be a serious matter," the author was contacted and his permission obtained to "tone down" derogatory references to the plaintiff "rather slightly." (404 F.Supp. at 1048.)

<sup>25</sup> White-Stevens so testified (Tr. 213), but Devlin did not recall such a warning (Tr. 152).



The court held that memoranda and letters recording these consultations were insufficient to raise a jury issue as to whether Doubleday published the book despite having serious doubts as to its truth. (404 F.Supp. at 1047-49.)

On the other hand, in *Hensley v. Life Magazine*, 336 F.Supp. 50 (N.D. Cal. 1971), the court summarily rejected an argument that failure to consult lawyers about the defamatory potential of material prior to its publication raised a jury issue as to actual malice. The court stated that in making this argument:

"It is obvious that plaintiffs have misconceived both the effect of *Curtis* . . . and the proper test now clearly established by the Supreme Court in *Rosenbloom*, i.e., not the *Harlan* test of mere negligence, but the *New York Times* test of actual malice as expounded and applied by *Rosenbloom*, supra, and *United Medical Lab., Inc. v. Columbia Broadcasting System*, supra, i.e., 'sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' " (336 F.Supp. at 54.)<sup>26</sup>

Thus, the worst that can be said of the failure to consult counsel is that it may have been imprudent—at least in light of what later developed—but that it is simply not even suggestive of a state of mind which doubted the accuracy of the article.<sup>27</sup>

<sup>26</sup> Citations by the court are to the following cases: *Curtis Publishing Company v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968).

<sup>27</sup> There is a suggestion in Judge Metzner's opinion (209a) that the fact that Devlin's notes of a conversation with one of the accused (non-plaintiff) scientists contain the notation "WOW" (769e) lends support to the verdict against the *Times*. The phrase appears to be a statement made by the scientist to Devlin (Tr. 132, 555-56); even if the "WOW" were attributed to Devlin, such enthusiasm for the story is hardly suggestive of "doubts" as to its veracity.

The heart of the allegations of "recklessness" against the *Times* stems from Judge Metzner's views that having received denials of the Clement/Audubon charges from three of the scientists called by Devlin and having received information from two of the scientists setting forth their scientific positions, that the story should not have been printed without more investigation and/or verification by the *Times*. But *Pape* and its progeny aside, the law simply does not permit "recklessness"—as constitutionally defined by *St. Amant*—to be so divined. In both *New York Times Co. v. Sullivan*, *supra*, and *St. Amant*, the failure to engage in precisely such pre-publication investigations was held to be inadequate as a matter of constitutional law to sustain findings of liability. As the Court explained in *Sullivan*, evidence of an inadequate investigation "supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."<sup>28</sup> (376 U.S. at 288.)

In short, even if no protection were afforded the *Times* by *Pape*, absent clear and convincing proof that the ma-

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<sup>28</sup> Nor does *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), provide any basis for such liability. As Justice Harlan's opinion in that case stated (citing *Sullivan* and *Garrison v. Louisiana*, 379 U.S. 64 (1964)), "Investigatory failures alone were held insufficient to satisfy [the actual malice] standard." (388 U.S. at 153-54.) Moreover, unlike the present case, the facts in *Butts* demonstrated conduct on the part of the defendant far more deficient than mere reportorial negligence and thus a jury verdict in favor of the plaintiff was upheld. (388 U.S. at 158.) The article complained of in *Butts* was based upon the unverified allegations of an informant whose reliability was open to serious question [by virtue of his recently having been placed on probation in connection with a bad check charge. 308 U.S. at 157.] Justice Harlan ruled, *inter alia*, that the evidence was sufficient to support a finding of actual malice in the sense of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." (388 U.S. at 158.) Even that test was later found insufficient in *St. Amant* and it has not been reasserted by the Court in cases governed by the *Sullivan* rule.

terials sent to Devlin by Jukes and White-Stevens and the oral denial by Spencer caused Devlin *actually* to conclude that the accusations of Audubon were false or that he had a "high degree of awareness of their probable falsity", the fact that Devlin was in possession of the materials at the time of publication is not probative of actual malice on his part.<sup>29</sup>

Nor may the fact of denials by the plaintiffs of the Clement/Audubon charges against them—denials reported in Devlin's article—permit a finding of recklessness against the *Times*. Denials are commonplace by public figures when charges are made against them in the heat of public controversy. In *Oliver*, the plaintiff's lawyer and secretary had given sworn testimony before a congressional committee denying the allegations published by the *Village Voice* linking plaintiff with the CIA. In granting the *Village Voice* summary judgment, the District Court expressly rejected the argument that "serious doubts" may

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<sup>29</sup> In fact the materials forwarded by Jukes and White-Stevens did not even directly address the Clement/Audubon charge made against them. The Audubon charges were read to both scientists on the telephone by Devlin (Tr. 230, 291); the enclosures by the scientists dealt in the entirety with the merits of the DDT debate, not with the merits of the Audubon charges.

Under such circumstances, it is the teaching of *Vandenburg v. Newsweek, Inc.*, *supra*, that the mailings to Mr. Devlin may not be treated as proof of actual malice. In that case, the Fifth Circuit rejected as irrelevant to actual malice the fact that a *Newsweek* reporter had received a certain news dispatch prior to publishing charges that plaintiff had threatened to expel black members of the track team he coached if they joined a boycott of a meet at the New York Athletic Club. The court found that the dispatch had no bearing upon whether the reporter acted with a "high degree of awareness or probable . . . falsity," because the "dispatch sent [the reporter] is not inconsistent with the *Newsweek* story; it simply does not discuss the reason for the athletes' earlier participation in the NYAC meet." (507 F.2d at 1028.) See also *New York Times Co. v. Sullivan*, *supra*, 376 U.S. at 263, 287, where the court refused to infer "the state of mind required for actual malice" from the fact that information available in defendant's own files contradicted allegations made in the advertisement there alleged to be libelous.



be inferred from such denials, noting that a contrary rule would inhibit reporting on controversial subjects. (417 F.Supp. at 238.) And denial of what were later determined to be false charges was precisely what was held insufficient to withstand a motion for judgment *n.o.v.* in the *Vandenburg* case discussed earlier.

We have reviewed what we believe to be all the reported cases since the *St. Amant* ruling which have focused on the "serious doubts" requirement set forth therein and we have found none which sustained liability or permitted liability to be imposed on a factual record as scanty as this and many which refused to permit a jury to find actual malice on far more evidence than was submitted in this case.

Thus, even where there has been evidence of fabrication by the defendant or publication of facts directly contradicted by documentary evidence in the hands of the defendant prior to publication, courts have often refused to permit a jury to decide whether the defendant was motivated by actual malice. In *Buchanan v. Associated Press*, 398 F.Supp. 1196, 1204-05 (D.D.C. 1975), for example, the court ruled that plaintiffs had failed to "meet their heavy burden of proof on the malice issue" required to withstand a motion for summary judgment, despite a factual dispute as to what, if anything, defendants had done to verify their wire report, and despite an admission that defendants had no source other than their own imagination for a portion of the report conceded to be inaccurate which compared financial transactions of plaintiffs to those of a convicted Watergate conspirator. Similarly, in *Meeropol v. Nizer*, 381 F.Supp. 29, 35 (S.D.N.Y. 1974), what the court referred to as an author's "minor fictionalization or approximations of conversations that may have taken place" between Julius and Ethel Rosenberg and their two sons was held insufficient evidence of actual malice to survive the author's motion for summary judgment. In that case, a jury was not permitted to infer "recklessness"

from plaintiffs' evidence—despite the conceded inaccuracies of certain of the information in the book. And, in *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858, 866-67 (5th Cir. 1970), the court held that plaintiff had failed to raise a jury issue as to actual malice, despite a showing that information stated in a magazine article and other facts that were suggested by an accompanying sketch were directly contradicted by information gathered by defendant's own researchers in preparing the story.<sup>30</sup>

The type of clear and convincing evidence of "serious doubts" that a public figure must produce in order to permit a jury verdict in his favor in a *Sullivan* case is particularly well illustrated by the previously discussed case of *Hotchner v. Castillo-Puche*, 404 F.Supp. 1041 (S.D.N.Y. 1975). In *Hotchner*, plaintiff, who had been a friend of the late Ernest Hemingway, alleged he was libeled in the American edition of a book by Jose Luis Castillo-Puche, another former Hemingway companion, which had been

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<sup>30</sup> *Lawlor v. Gallagher Presidents' Report, Inc.*, 394 F.Supp. 721 (S.D.N.Y. 1975), a libel action tried to Judge MacMahon after the parties waived a jury, is also instructive as to the kind of facts which have been considered to show serious journalistic failing but not actual malice. There, defendants published what the court described as a report "clearly intended to . . . injure [plaintiff] in his occupation and profession" (394 F.Supp. at 730) without any verification beyond a single "perfunctory and futile telephone call." (394 F.Supp. at 733.) After an editor placed a telephone call to plaintiff at his former place of business and was told he was no longer there and had left no forwarding address, she did not ask to speak with other company executives familiar with the events in question but published the story without further checking. (394 F.Supp. at 733.) Analyzing the record, Judge MacMahon stated that one plausible explanation for defendants' defamatory publication was that the editor had "carelessly distorted [her] information and magnified the wrong in order to sensationalize the story." (394 F.Supp. at 733.) Even then, he concluded, defendants had acted only negligently. Judge MacMahon rejected as "without merit" plaintiff's contentions of actual malice, holding that under no view of the facts could publication with a "high degree of awareness of probable falsity" be inferred. (394 F.Supp. at 733, n. 23, quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).)

translated from the original Spanish and published by Doubleday and Company, Inc. (404 F.Supp. at 1043). In reviewing the record on a motion for summary judgment by Doubleday, the court focused on the fact that a Doubleday editor had referred passages of the manuscript mentioning the plaintiff Hotchner to the publisher's Contracts Department for its "review from the standpoint of libel", and in so doing had attached a note which read in part:

"... the author of this book doesn't seem to like Hochner (sic) very much; ... I don't really think anything [Castillo-Pucile] says in the book about Hochner (sic) is libelous—it's probably just bitchy. But I thought you should look at the attached pages, which refer to Hochner (sic), and say whether you think it's okay to publish with this sort of sideswiping left in." (404 F.Supp. at 1047)

In a responding memorandum, Doubleday's Assistant Contracts Manager expressed the following opinions about the manuscript in recommending that certain references to the plaintiff be "toned down or eliminated":

"When looked at together these statements certainly ridicule Hotchner and impugn his reputation and character. As he seems to be an author who has worked in movies and TV, this could be a serious matter.

"To make matters worse I doubt whether any of these statements can be substantiated in any way." (404 F.Supp. at 1048)

The record in *Hotchner* also included a letter to Puche from the Doubleday editor requesting permission to "tone down your remarks on [the plaintiff], rather slightly," because of advice from lawyers that

"... it's possible that he [the plaintiff] would think that some of your remarks border on "malice" (in the



legal sense) and that it would be professionally damaging to him, which in a legal sense could come under the legal grounds "damaging to his reputation and character."'" (404 F.Supp. at 1048.)

Subsequently, Puche communicated his approval of the proposed "toning down" and certain revisions were made by Doubleday's editor. (404 F.Supp. at 1048-49.) On the basis of these memoranda and letters, the Court denied summary judgment, holding that were a jury to find that the book contained defamatory falsehoods despite the publisher's revisions, it could also find that Doubleday had been "culpably reckless" in publishing its book despite serious doubts as to its accuracy. (404 F. Supp. at 1049.)

Similarly, in the recent case of *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), affidavits had been filed on behalf of two defendant publishing companies stating their belief in the truth of an article alleged to be libelous. The Court held the affidavits to be "of no value in view of the other facts in the record", which it found to be sufficient to require resolution by a jury of the issue of actual malice. (529 F.2d at 213.) These other facts included direct contradictions between defendants' article and a previously published newspaper article upon which defendants relied for the veracity of their own article (529 F.2d at 212); failure to investigate one clearly false fact in the earlier news article, where the fact had been used in a "subdued, relatively non-defamatory" manner, unlike defendants' story, where that fact was the "key-stone fact" at the center of an "inflammatory diatribe" (529 F.2d at 211); and the publishing of "completely fabricated . . . accusations" and "wholly imagined but supposedly precisely quoted conversations" involving the plaintiffs. (529 F.2d at 213.) The Court concluded, citing *St. Amant*:

"The defendants in fabricating and imagining 'facts' necessarily entertained serious doubts as to the truth

of the statements and had a high degree of awareness of their probable falsity." (529 F.2d at 213.)

Again, in *Guam Teachers' Local 1581 (AFT) v. Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974), the court held that defendant's assertion that he believed his statements were true was not enough to justify withholding determination of the issue of actual malice from a jury, where defendant had also:

"... repeatedly admitted that he did not know whether what he said was true. He repeatedly admitted that he did nothing, or almost nothing, to verify his charges. As to most of his statements, he repeatedly admitted that he knew of no facts to support them; he either relied upon unspecified rumor or upon nothing at all." (492 F.2d at 439.)

All these cases point clearly to the proposition that proof of "serious doubts" or a "high degree of awareness of probable falsity" requires far more proof—and proof of an entirely different character—than was adduced in this trial.

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We do not think we do Judge Metzner an injustice if we characterize his view, as expressed from the day the first summary judgment motion was made in this case, as reflecting deep antipathy to the publication by the *Times* of charges of impropriety against the scientists that have commenced this action. What is at issue in this case is nothing less than whether when an organization such as Audubon makes such charges, the *Times* may print them—without concern for the immense burden, costs and risks resulting therefrom.

We think it should be self-evident that if one political figure makes defamatory statements about another—as, for example, candidates for the office of Vice President of the United States—that the press may freely report them;

or that if Mrs. Onassis were to charge other public figures with improprieties, that the press could freely report those charges *regardless* of the views of the journalists or editors involved as to the truth of the charges.

In this case, in short, there is *no* evidence of "serious doubts" on the part of the *Times*, as that term has been so often defined in the case law. Even if such evidence were in the record, we would urge this Court—and we do urge it—to take this occasion explicitly to adopt the line of cases commencing with *Pape* and including decisions such as *Vandenburg*, *Thuma*, *Novel* and *Oliver* and, on that basis, to reverse the judgments entered against the *Times*.

## II.

### **The Trial Court Erroneously Held the Audubon Charges Reported by *The New York Times* to Be Libelous *Per Se* and Erroneously Excluded Evidence Demonstrating the Contrary.**

As we have previously noted, Judge Metzner held at the outset of the trial that the *Times* article reporting the Audubon charges was libelous *per se*, and in accordance with this ruling, refused, over the objection of the *Times*, to admit as evidence of the context and meaning of the "paid to lie" allegations, public statements by each of the plaintiffs strongly accusatory of Audubon and other opponents of the continuing use of DDT. We submit that both these rulings were clearly erroneous under this Court's recent decision in *Buckley v. Littell*, *supra*, and caused substantial prejudice to the *Times*.<sup>31</sup>

<sup>31</sup> Judge Metzner's statement in his opinion denying judgment *n.o.v.* to the effect that the *Times* had never contended that the Audubon statements it reported were not libelous (208a) is inaccurate. The *Times* sought the admission of evidence, discussed in this section, to demonstrate that, in context, the statements were not libelous (Tr. 220-21); it proposed jury charges to that effect which the trial court refused to give (*Times* Requested Instruction



In *Buckley*, similarly to this case, the statements at issue were not an isolated occurrence but part of a controversy that had been waged for some time between the plaintiff, William F. Buckley, Jr., the conservative columnist and public personality, and the defendant, Franklin H. Littell, a theologian. Littell and the organization he headed called the Institute for American Democracy (IAD), whose avowed purpose was to combat political extremism, had been repeatedly attacked by conservative spokesmen, including Buckley in his column and the *National Review*, of which Buckley is editor-in-chief. A particularly heated exchange took place in 1967 and early 1968, involving a report in *National Review* on a speech by Littell followed by letters between Littell and Buckley making mutual accusations, and culminating with Buckley's publication of a column denouncing Littell as an "abusive rhetorician" and IAD as a "phoney outfit" which was "commissioned to defame Senator Goldwater." (539 F.2d at 887.) Buckley filed suit after the publication in 1969 of a book by Littell called *Wild Tongues*, and after trial without a jury, was awarded one dollar compensatory damages and \$7,500 punitive damages on the basis of three statements found by the trial judge to be defamatory and published with actual malice. *Buckley v. Littell*, 394 F.Supp. 918 (S.D. N.Y. 1975).

On appeal by Littell, the principal issue as framed by this Court, was whether clear and convincing evidence could be found upon examination of the record "in the light of the imperatives of 'uninhibited, robust and wide-open debate'" set forth in *Sullivan*, that each of the alleged libels had a defamatory meaning (539 F.2d at 888, n.3.) In *Buckley*, as in this action, the trial judge had based his rulings with respect to the alleged libel on the common law

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No. 7, 135a-136a; Tr. 559) and duly took exception thereto (Tr. 648). An issue in the case as to which the *Times* took no position was whether Audubon's charges were true (Tr. 42).

of New York, relegating constitutional considerations to the fault element of plaintiff's case. (394 F.Supp. at 925.) Departing from this approach at the outset, this Court observed that "[t]he law of defamation has been rewritten in light of the constitutional imperatives" (539 F.2d at 888), and held that "when interpretation of a communication in light of the constitutional requirements is involved," an appellate court's function is to "examine in depth the 'statements in issue' and the 'circumstances in which they are made.'" <sup>32</sup> The Court concluded that in a case, like this one, governed by the actual malice rule, not only the defendant's alleged fault "[b]ut the determination of what is libelous must also be measured very carefully." (539 F.2d at 890.)

Applying these principles to the facts before it, the court held erroneous the trial judge's finding of libel with respect to two statements published in *Wild Tongues* (Littell's reference to Buckley as a "fellow traveler" of "fascism" and his allegation that Buckley acts as a "deceiver" in the purveying of fascist material), on the ground that such ambiguous and loose statements fell in the area of opinion (as opposed to fact) given explicit protection in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974), and were susceptible of nondefamatory interpretations. (539 F.2d at 890-95.) <sup>33</sup> However, the court upheld the finding of libel with respect to a third statement (charging Buckley with engaging in the same kind of libelous journalism as Westbrook Pegler practiced against Quentin Reynolds), finding this accusation "a factual assertion relating to Buckley's journalistic integrity" outside the protected

<sup>32</sup> 539 F.2d at 888, citing *New York Times v. Sullivan*, *supra*, 376 U.S. at 285, n. 26; *Davis v. Schuchat*, 510 F.2d 731, 735-36 (D.C.Cir. 1975); *Goldwater v. Ginzburg*, *supra*.

<sup>33</sup> Particularly with respect to the second of these statements, the Court also expressed doubt as to the correctness of the district court's reading of Littell's text. (539 F.2d at 895.)

realm of opinion with respect to political or social issues. (539 F.2d at 895-96.)<sup>34</sup>

Turning to the application of the standards set forth in *Buckley* for the interpretation of an alleged libel to the Audubon charges reported by the *Times*, it is evident that the trial judge's holding that such charges were libelous *per se* was improper, for he made no interpretation of the language at all, much less an interpretation in light of First Amendment imperatives.<sup>35</sup> *Buckley*, at a minimum, surely requires that in a defamation case tried before a jury that the judge, at an *in limine* hearing, hear such evidence as is necessary to enable him carefully to measure, in light of First Amendment imperatives, whether the issue of the meaning of an alleged libel is one which the jury should decide.<sup>36</sup> At the very least, in the context of

<sup>34</sup> The third alleged libel, involving an assertion that Buckley published lies, bears resemblance to the statements here at issue. However, such resemblance, we submit, in no way detracts from the direct applicability of the standards set forth in *Buckley* to the libel alleged in this case.

<sup>35</sup> Judge Metzner's only reference to *Buckley* in his decision denying the motion of the *Times* for judgment *n.o.v.* was the following:

"The [*Times*] story is clearly libelous. *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976)." (207a)

<sup>36</sup> The rule under the common law of New York as to when a jury should be permitted to decide whether a statement is defamatory and when the judge ought to instruct that it is has been summarized as follows:

"Save when words are necessarily defamatory, 'It is for the court in the first instance to determine whether the words are reasonably capable of a particular interpretation; it is then for the jury to say whether they were in fact so understood,' Prosser, Torts 581 (1955): 1 Harper & James, *The Law of Torts* 463-64 (1956)." *Pauling v. News Syndicate Co.*, 335 F.2d 659, 663 (2d Cir. 1964), *cert. denied*, 379 U.S. 968 (1965) (footnote omitted).

This rule apparently would be qualified by *Buckley* only to the extent that a court would be permitted to decide that words were "necessarily defamatory" only if satisfied by clear and convincing evidence that such decision was consistent with First Amendment imperatives.



a jury trial, *Buckley* forbids a judge to do what was done here: to rule summarily that a statement is libelous *per se*, notwithstanding considerable probative evidence relating to the context in which the words were uttered, and thus to withhold this issue from the jury. Had the District Court, as required by *Buckley*, undertaken the task of carefully interpreting the term "paid liar" in the context in which it was used—or, at least, permitted the jury to do so—the abundant evidence offered by the *Times* of accusatory statements made by the plaintiffs themselves with respect to opponents of DDT—among them, Audubon—during the course of the DDT controversy would have been admitted into evidence.<sup>37</sup>

During the course of the DDT controversy, the plaintiffs repeatedly made extraordinarily harsh, at times vicious accusations against their opponents. Among the accusations made by Edwards were the following:

"... the anti-DDT leaders were as aware as we were that such a charge was completely untrue. They used it for purely propaganda purposes; thinking (as did Hitler) that 'the ends justify the means.'" [Letter dated February 17, 1970 to Editor, *Audubon Magazine*, *Times* Exhibit WWW, 1169e]

"We have been exposed to a barrage of anti-DDT propaganda which is remarkably untruthful." [editorial entitled "DDT defended — 'Unbelievability' of Charges Aired," *Sunday Oregonian*, December 28, 1969, *Times* Exhibit XX, 1094c]; and

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<sup>37</sup> It was also the position of the *Times* at trial that such evidence related to damages and should have been admitted to permit the jury properly to determine the damages, if any, proximately caused by the *Times* article (as distinct from injury to reputation which occurred from other attacks made by or against the plaintiffs during the DDT controversy) as well as properly to decide how serious any such damages were in light of similar charges the plaintiffs themselves had made (Tr. 15-22, 221-22).

"Most scientists grew up, as I did, with truthful, trustworthy friends and colleagues. It is quite a shock, therefore, to discover that some of our modern scientists have deliberately obscured facts, distorted and misstated data, misquoted sources, padded references with statements only by co-conspirator and entitled their articles in such a way as to conceal the actual significance of their observations. I am sure that most of us are now aware of the demise of objectivity, of careful analysis, of data verification, and of critical scientific review prior to publication. . . . the old days of scientific ethics and morality seem remote. We can cite dozens of examples of flagrant perfidy in articles which are being utilized in the attempt to eliminate DDT and other chemicals." ["Environmental Kangaroo Court," dated February 23, 1972, *Times* Exhibit FF, 1048e]

Jukes, in an article entitled "DDT, Human Health and the Environment", published in *Environmental Affairs*, Vol. 1, No. 3, November 1973, wrote:

"The National Audubon Society which appears to have a predominantly white and middle-class membership is one of the most active anti-DDT organizations. For a member to condone the use of pesticides would be tantamount to the deepest heresy in a religious sect. For an official of the Society to approve such use would be fiscal lunacy, in view of the tremendous amount of free publicity that the Society has received as a result of *Silent Spring* and other publications which have established a new mythology—the extermination of wild birds by agricultural pesticides. The Society shows underlying resentment of human beings and all their works, including cities, farms, highways, and especially private industry. Membership in the Society is a form of expiation of the sin of being one of the human race, the species that consumes 'the en-

vironment'. The Society stated recently that one of its two main purposes is 'the education of man regarding his relationship with and his place within the natural environment as an ecological system.' This pious pronouncement is actually intended to exclude man as an inhabitant of the Earth, except in small numbers and in a primitive, mythical, aboriginal state. The Audubon Society has no program for the relief of suffering among millions of human beings in the tropics." (*Times* Exhibit L, 972e-73e) (footnote omitted).

Jukes has also made such public statements as:

"I realized that DDT had done far more for human beings than all the research in nutrition. I also realized that we were confronted with the successful use of the 'Big Lie' in science for the first time." ["Scientific Agriculture at the Crossroads," *Agrichemical Age*, November 1972, *Times* Exhibit O, 1004e];

and made reference to:

"quacks" and "the existence of a cult of food quackery." [*Id.*, 1002e];

and he has alleged:

"Since the issue of monetary interest has been raised let us examine the financial rewards made by those opposing pesticides. . . .

"The National Audubon Society must undoubtedly have benefited financially from the current campaign against pesticides by gaining new members and donations. ["The TRUE facts about Pesticides and the Environment," *Farm Chemicals*, March, 1967, *Times* Exhibit S, 1005e, 1008e]

White-Stevens has referred to environmentalists as "The New Witch Doctors" and "Shamans" ["Fads and Fallacies



in the Name of the Environment", presentation made January 25, 1974; *Times* Exhibit 000, 1136e, 1138e]; he has denounced the "noisome and prevaricative publicity" given to food additive laws and has alleged that criticism of agricultural chemicals "is based on half truths, scraps of irrelevant and unrelated evidence, much of it taken out of context and out of time, and largely founded upon superstition and outright falsehood". ["The Role of Agricultural Chemicals in Feeding an Exploding Population", Ass'n of Food and Drug Officials of the United States, Vol. 27, No. 1, January 1963, *Times* Exhibit NN, 1056e.]

Just as in the *Buckley* case, where this Court interpreted the accusations made in *Wild Tongues* in light of the "strongly-worded interchange" between Buckley and Littell "as well as the continuing criticism of Littell and IAD in the *National Review*" (539 F.2d at 887), we believe that the Audubon charges reported by the *Times* could only have been properly understood in the context of the heated DDT debate, during which statements such as those quoted above were routinely made by the plaintiffs.<sup>38</sup> The District Court erred in ruling to the contrary.

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<sup>38</sup> Although *Buckley* is, we believe, the first case to make so explicit the role of the First Amendment in the determination of whether a statement is defamatory, it has previously been held that where statements alleged to be libelous were uttered in the course of a heated controversy, the statements should be interpreted in light of that controversy. For example, in *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966), statements accusing the plaintiff of, *inter alia*, "lying" to employees (383 U.S. at 56) were interpreted by the Court in the context of the labor representation campaign in which they were uttered. The court observed:

"Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable *per se* in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly,

Another error arises out of the trial judge's erroneous conclusion that the *Times'* reporting of Audubon's charges was libelous *per se*. Special questions, drafted by the Court, were submitted to the jury in this case (220a-24a) Each commenced similarly and as follows:

- a. "Was [Edwards] libelled?"
- b. If yes, by which defendant(s)?"

In the context of the trial court's prior statement to the jury that the publication was "libelous *per se*" (Tr. 508) and its charge that the material was defamatory as a matter of law (Tr. 632), it was extremely confusing and prejudicial for the special questions to inquire into that which the jury might well have thought the judge had already answered—*e.g.*, was the plaintiff "libelled"? Objection was made to the phraseology of the special questions (Tr. 625) but the trial judge refused to change it. The failure to do so, we believe, itself warrants reversal. *See, e.g., Frederic P. Wiedersum Associates v. National Homes Construction Corp.*, 540 F.2d 62, 66 (2d Cir. 1976); *Sessoms v. Union*

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embellishing their respective positions with imprecatory language." (383 U.S. at 58.) (citation omitted.)

In *Fram v. Yellow Cab Co.*, 380 F.Supp. 1314 (W.D.Pa. 1974), an action for defamation involving defendant's reference to plaintiff on a radio program as "paranoid" and "schizophrenic," the court determined it "essential" to construe these words in light of the long-standing controversy between the parties, rivals in the taxicab business in Pittsburgh. (380 F.Supp. at 1318.) After a detailed review of this controversy, the court granted defendant's motion for summary judgment, holding that the words complained of were properly understood not in a defamatory sense but as "rhetorical hyperbole" responding to plaintiff's prior accusations. (380 F.Supp. at 1330.) In so ruling, the court found it relevant that the radio program's audience was "accustomed to hearing criticism, accusation, and controversy." (*Id.*) Similarly, in this case, the scientific community with respect to which plaintiffs' claims of impaired reputation must be judged was surely not unaccustomed to hearing harsh statements, including personal accusations, during the course of the controversy over DDT.

*Savings and Trust Co.*, 342 F.2d 751 (6th Cir.), cert. denied, 382 U.S. 821 (1965).

### CONCLUSION

The judgments entered against the *Times* should be reversed and judgment ordered entered on behalf of the *Times*.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

- - - - - x

J. GORDON EDWARDS, Ph.D., THOMAS :  
H. JUKES, Ph.D., ROBERT H. WHITE- :  
STEVENS, Ph.D., :

Plaintiffs-Appellees, :

-against- :

NATIONAL AUDUBON SOCIETY, INC., :  
ROBERT S. ARBIB, Jr., ELVIS J. :  
STAHR, Jr., :

Defendants, :

THE NEW YORK TIMES COMPANY and :  
ROLAND C. CLEMENT, :

Defendants-Appellants. :

- - - - - x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

THOMAS M. DOYLE, JR., being duly sworn, deposes and  
says:

1. I am over the age of 18 years and not a party  
to this action.

2. On the 8th day of March, 1977, I served the  
annexed BRIEF FOR APPELLANT NEW YORK TIMES COMPANY (2 copies);  
JOINT APPENDIX (2 volumes) and EXHIBITS

AFFIDAVIT OF SERVICE

Index No. 77-7018

by hand upon:

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Attorney for Defendant-Appellant  
Roland C. Clement  
Gifford, Woody, Carter & Hays  
14 Wall Street  
New York, New York 10005

by delivering and leaving true and correct copies thereof at  
the office of the above-mentioned attorneys.

3. On the 8th day of March, 1977, I further served  
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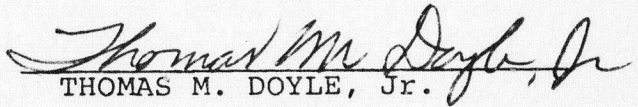
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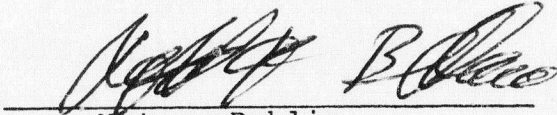
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by depositing true and correct copies thereof in the letter drop maintained by the United States Postal Service at 80 Pine Street, enclosed in stamped, sealed envelopes addressed to the above-mentioned attorneys.

  
THOMAS M. DOYLE, Jr.

Sworn to before me this  
8th day of March, 1977

  
Notary Public

ROBERT F. BELLUSCIO  
Notary Public, State of New York  
No. 31-4625331  
Qualified In New York County  
Commission Expires March 30, 1978



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